

Docket SJC-236

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and
CALKINS, JJ.

STATE OF MAINE

SUPREME JUDICIAL COURT
Original Proceeding
Docket No. SJC-236

In the Matter of



1998 General Election
County Commissioner, District 3
Somerset County

DECISION

[¶1] After a recount in the 1998 General Election of County Commissioner, District 3, Somerset County, a final count, before review of the disputed ballots involved in this appeal, was 2,558 votes for Joseph B. Bowman and 2,556 for Carl A. McKenney. This final tabulation includes the vote of one challenged voter. There are, in addition, four challenged ballots.

[¶2] The challenged ballots are from municipalities using machine tabulations carrying the following instruction at the top of the ballots:

INSTRUCTIONS TO VOTERS

Complete the arrow  pointing to the name of the candidate for whom you choose to vote, like this . You may vote for a person whose name does not appear on the ballot by writing the person's name and municipality of residence in the blank space provided and completing the arrow at the right. If you make a mistake, you may request a new ballot. DO NOT ERASE.

[¶3] Our review is conducted pursuant to 21-A M.R.S.A. § 737-A(10).¹ We are asked to determine which, if any, of the disputed ballots should be counted in light of the relevant statutes. The counting of ballots is governed by § 696 of Title 21-A of the Maine Revised Statutes which provides in part:

§ 696. Challenged, defective or void ballots

The counting of ballots is governed by the following provisions.

...

2. Defective ballot. A vote for an office, candidate or question held to be defective by the warden or ward clerk may not be counted for that office, candidate or question as follows.

...

B. If a voter marks the voter's ballot in such a manner that it is impossible to determine the voter's choice, the voter's vote for the office or question concerned may not be counted.

...

4. Determination of choice possible. If a voter marks the voter's ballot in a manner that differs from the instructions at the top of the ballot but in such a manner that it is possible to determine the voter's choice, then the vote for the office or question concerned must be counted. A mark made on or in the voting indicator that differs from the instructions at the top of the ballot but that clearly indicates the voter's choice is not a distinguishing mark.

¹ **10. Appeals.** For all elections, except for the Senate and the House of Representatives, if there are enough challenged or disputed ballots to affect the result of an election, the Secretary of State shall forward the ballots and related records for that election to the clerk of the Supreme Judicial Court. The Supreme Judicial Court shall determine the result of the election pursuant to procedures adopted by court rule. The decision of the Supreme Judicial Court is final and must be certified to the Governor by the Chief Justice.

For all elections to the Senate and the House of Representatives, each House shall establish procedures for recount appeals.

A. When a voter has clearly manifested an intention to make a distinguishing mark, or to mark the voter's ballot in a manner inconsistent with an honest purpose or to act in a fraudulent manner, then the ballot is void.

[¶4] The ballots in question were marked “in a manner that differs from the instructions at the top of the ballot.” Our charge is to determine whether “it is possible to determine the voter's choice.” We deem controlling the legislative direction “[A] mark made on or in the voting indicator that differs from the instructions at the top of the ballot but that clearly indicates the voter's choice is not a distinguishing mark.” (emphasis added). We therefore examine the ballots to determine whether the voter's choice in the contest under examination is clearly indicated.

BALLOT A-3-1

[¶5] The ballot designated A-3-1 for recount purposes was challenged by Mr. McKenney. On this ballot, the voter did not vote for any candidates for Governor, Representative to the Legislature, County Treasurer, Sheriff, or District Attorney. The voter correctly “completed the arrow” to vote for the voter's choice for Congress, State Senator, and Register of Deeds. As to the contest in question, the voter completed the arrow pointing to the names of both candidates and in addition the voter crossed out Mr. McKenney's name. The voter was able to correctly follow the instructions to indicate the voter's choice of a candidate for Congress, State Senator, and Register of Deeds. The voter's choices were all for the democratic candidate. In voting for County Commissioner, the voter “crossed out”

candidate McKenney's name and connected the arrow to vote for candidate Bowman. We determined the voter having voted for candidate Bowman.

BALLOT A-11-1

[¶6] The ballot designated for recount purposes as A-11-1 was challenged by Mr. McKenney has check marks on almost every line of the ballot, including six of nine lines that contained only the office heading and no voting indicated. The only line without a check mark is the line bearing Mr. McKenney's name. We are unable to determine the voter's choice as reflected on this ballot and therefore it may not be counted.

BALLOT D-6-1

[¶7] The ballot designated for recount purposes as D-6-1 was challenged by Mr. McKenney. This ballot reflects no choice of candidate for Governor, Representative to Congress, State Senator, Register of Deeds, or District Attorney. The ballot reflects "x's" beside the names of both candidates for Representative to the Legislature, beside the name of the candidate for County Treasurer and circles around the party affiliation for candidates for Sheriff and County Commissioner. The voter did not mark his or her ballot in "a manner that is possible to determine the voter's choice," therefore the ballot may not be counted.

BALLOT F-6-1

[¶8] The ballot designated for recount purposes as F-6-1 was challenged by Mr. Bowman. On this ballot the voter marked a line from the tip of the incomplete arrow to the names of a candidate for Governor, Representative to Congress, State Senator, Register of Deeds, Sheriff, and in

the case of the County Commissioner's race from the tip to Mr. McKenney's name. When viewed as a whole, the ballot indicates that the voter's choice was for Mr. McKenney and therefore the ballot should be reflected as a vote in favor of Mr. McKenney.

[¶9] Thus, we determined that one of the disputed ballots is to be counted in favor of Mr. McKenney and one is to be counted in favor of Mr. Bowman. Therefore, it is determined that Mr. Bowman has 2,559 votes and Mr. McKenney 2,557. Since the challenged voter's ballot cannot have affected the outcome, we need not examine that voter's ballot and declare Joseph Bowman to have been elected County Commissioner for District 3, Somerset County, such result to be certified to the Governor by the Chief Justice.

DATED: December 29, 1998

For the court,

Paul L. Rudman
Associate Justice

(The signed original of this Decsion is on file in the clerk's office.)